Supreme Court, U.S.
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No. 95-1534

In The

Supreme Court of the United States

October Term, 1995

B.J. McADAMS, INC., Debtor.

CONSTELLATION DEVELOPMENT CORP.,

Petitioner,

vs.

JAMES F. DOWDEN, SUCCESSOR TRUSTEE, RICHARD L. SMITH, TRUSTEE AND UNITED STATES *EX REL.* INTERNAL REVENUE SERVICE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JAMES F. DOWDEN, SUCCESSOR TRUSTEE

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LIST OF INTERESTED PARTIES

All parties are correctly listed in the caption of the case. This response is filed on behalf of James F. Dowden, Successor Trustee for B.J. McAdams, Inc. and Richard L. Smith, Trustee. A separate response will be filed by the United States, Internal Revenue Service.

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OPINION BELOW

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Eighth Circuit. That decision is reported at 66 F.3d 931 (8th Cir. 1995). All references to the opinion will be to the opinion found at pages 1-15 of the Petitioner's Separate Appendix.

STATEMENT OF JURISDICTION

Jurisdiction of this Court has been invoked properly by reference to 28 U.S.C. § 1254(i). However, no questions are properly presented for this Court's review.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari. The petition is a rambling, disjointed, harangue by petitioner against an array of perceived errors made at all levels in its litigation seeking to enforce a lien. If the Questions Presented for Review found at page i of the petition are the issues petitioner is presenting, two (2) of the questions, i and iii, were not properly preserved for resolution by this Court. The remaining question, ii, is one of state common law. More importantly, the decision appealed from resolved the issue as a matter of fact, rather than an examination of state common law. Consequently nothing is properly presented for this Court's review.

A. Course of Proceedings and Disposition of the Case Below.

An involuntary petition in bankruptcy was filed against B. J. McAdams, Inc., on March 28, 1990. On September 30, 1991, James F. Dowden was appointed successor trustee.

B. J. McAdams, Inc., ("BJM") was a trucking company owned by B. J. Adams. The following entities were also created by or at the direction of McAdams: (1) Petitioner, Constellation Development, Inc., ("Constellation"); (2) Parthenon Insurance Company, ("Parthenon"); and (3) B. J. McAdams Drivers Services, Inc., ("Drivers Services").

Constellation was created to provide financing to BJM, along with funds from a purported "trust fund" belonging to McAdams' son, Robert. Parthenon was created to provide liability insurance coverage for BJM. Drivers Services was created to provide leased employees to BJM and thereby take advantage of low workers' compensation rates in the state of Indiana. McAdams also drafted the document, entitled Matching Fund and Other Type Loan(s) and Security Agreement, which governed the relationship among BJM and these entities.

The Trustee filed complaints to determine the nature, extent and validity of liens purportedly held by Constellation and others against certain property of BJM. The complaints sought declarations of the appropriate disposition of proceeds from the sale of a 1977 Gates Learjet and other personalty. In addition, the Internal Revenue Service filed complaints seeking a declaration that Constellation was an alter ego of BJM, thereby rendering Constellation's purported lien invalid.

Constellation and the Internal Revenue Service claimed competing interests in the proceeds from the sale of all of debtor's property. The Trustee is holding the proceeds of the sale of the property pending the resolution of this action.

Following a consolidated trial of these proceedings, the Memorandum and Order dated June 14, 1991 was entered. (Petitioner's Separate Appendix pp.18-36) After recounting the findings of fact and conclusions of law, the opinion stated:

> Therefore, this court will find that Constellation, Parthenon, and Drivers Services were all the "alter egos" or a [sic] mere instrumentalities of the Debtor, BJM, Inc. As such the loans and security arrangement between Constellation and McAdams should be declared invalid and void as a mere sham. . . . Accordingly, because Drivers Services is determined to be the alter ego of the Debtor, BJM, Inc., its tax delinquencies may be recovered from BJM, Inc. Thus, because the IRS has properly filed tax liens against the property that is the subject of this action, those liens are determined to be valid.

Memorandum and Order (Petitioner's Separate Appendix p. 35).

An interlocutory appeal to the United States Court of Appeals for the Eighth Circuit, unrelated to any of the issues discussed herein, was pursued. That decision is reported at 999 F.2d 1221 (8th Cir. 1993). Following the remand, petitioner appealed to the United States District Court, which affirmed. (Petitioner's Separate Appendix pp.16-17). That decision was appealed to the United States Court of Appeals for the Eighth Circuit which affirmed. Petitioner now seeks a writ of certiorari in this Court.

B. Correction of Misstatements in the Petition.

Petitioner has littered its petition with innumerable facts. It is difficult to respond to those facts because they are so incoherently stated. Nevertheless, all relevant facts are stated in the court of appeals decision and in the interest of brevity this Court's attention is directed to that opinion, both for an accurate

statement of the facts as well as the issues preserved for appeal. The opinion makes the following observation:

> We are not confronted with an alter ego action brought by the trustee in an effort to pierce BJMI's corporate veil and hold its principals personally liable on it debts. Rather, the trustee sought a judicial determination of the validity, extent, and priority of competing liens asserted against property of the bankrupt estate, including those of Constellation and the IRS.

This finding, which is manifestly obvious from the record below, emasculates the argument of the petitioner.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court generally refuses to review judgments rendered where the issues on appeal have not been raised below and properly preserved for appeal. *Tacon v. Arizona*, 410 U.S. 351 (1973). This case presents a classic example of issues being raised on appeal that were mentioned but never at issue in the courts below.

Petitioner alleges that it was deprived of due process by the denial of a jury trial on the existence and validity of a lien it claimed to hold on property belonging to a bankrupt. That issue is one of law and would be determined by the court in any instance, yet petitioner contends it should have had a jury trial.

In support of its contention, petitioner erroneously cites *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). For all of the propositions one might cite *Grandfinanciera*, an absolute guarantee of a jury trial on every issue is not one of them. Petitioners argument seems to be that because a large amount of money is involved, a jury trial is a must. The materialistic approach suggested by the petitioner does not comport with this Court's history of protection of this vital constitutional right. In short, petitioner cites no authority that would support its argument, nor does it make a persuasive argument for the extension of the current law.

II.

THE OPINION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE COURT.

Petitioner relies upon the opinion of the court of appeals in *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987) to support its position. In *Ozark* the court of appeals held that a bankruptcy trustee could not enforce the rights of creditors through the use of an "alter ego" action against the debtor. This right was reserved to creditors acting on their own accord. The court of appeals found as a matter of both fact and law that the trustee in this case was not pursuing such an action. The court of appeals did affirm the finding of the trial court that the petitioner is an alter ego of the debtor in this case. However, it did so on the basis of the action brought by the Internal Revenue Service, a creditor of the debtor entity and a competitor for priority with petitioner.

The petition cannot be read to challenge the right of the IRS to bring such an action. Petitioner simply misunderstands, or more likely refuses to accept, the basis of the holding of the court

of appeals. Although addressed to the issue of petitioner's arguments concerning federal jurisdiction, a quote from the court of appeals decision is applicable to petitioner's conduct of this entire proceeding "[it] betrays a profound misunderstanding of the basic concepts. . . ." (Petitioner's Separate Appendix p. 11).

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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